No. 01-638

In The

Supreme Court of the United States

STATE ENGINEERING ASSOCIATION, *et al.*

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the assets and earnings of the Wisconsin Retirement System are the "private property" of participants in the Wisconsin Retirement System for purposes of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

2) Whether the judicial abandonment or recasting of well established private property rights, properly voids the Constitutional protections of the Fifth and Fourteenth Amendments to the United States Constitution as to the taking of such private property without just compensation and without due process of law.

3) Whether the challenged provisions of 1999 Wisconsin Act 11 take the private property of participants in the Wisconsin Retirement System without just compensation and without due process of law.

4) Whether the challenged provisions of 1999 Wisconsin Act 11 impair the contract between participants and the State of Wisconsin in violation of Article I, § 10 of the United States Constitution.

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I. NONE OF THE REASONS CITED BY RESPONDENTS SUPPORT DENIAL OF THE PETITION.

Several of the points made in Respondents' Briefs in Opposition warrant a reply:

1. The Respondents repeat the hollow assertion of the Wisconsin Supreme Court that Act 11 bolsters the security of the WRS by the inclusion of the following *non-statutory* language: " . . . the employee trust fund board [the trustees of the WRS trust fund] shall retain authority to maintain proper actuarial funding of the Wisconsin retirement system." The Court states: "[t]his affirmation of the ETF Board's authority represents a fail-safe for the WRS that overrides all other provisions of Act 11." App. 79, ¶ 191. It is astounding that this alleged "fail-safe" and "overriding" "affirmation" is contained in the *non-statutory* portion of Act 11; that it is part of legislation that seeks to use internal trust funds to pay for obligations that the trust fund's actuary has determined to be necessary for the funding of benefit commitments; and that it was inserted into Act 11 in anticipation of the present litigation.[1] Even as the court enunciates this empty "affirmation", it approves the use of trust funds as a source of funding a $200 Million dollar taxpayer "respite" by paying participating employer obligations to the WRS, that were actuarially determined, with WRS funds.

The absurdity of the court's view of Act 11 as protective of the "proper actuarial funding of the Wisconsin

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[1] Indeed, Act 11 contains a non-statutory provision expressly requesting that the Supreme Court take original jurisdiction of any litigation relating to the implementation of Act 11. App. 140.

retirement system" cannot be gainsaid when one considers what Act 11 does and the what the court does. The court declares that any concerns about future raids on the trust fund should be allayed because "the ETF Board would stand as a bulwark of fiduciary responsibility to protect the security of the fund." App. 81, ¶ 198. Yet, upon the adoption of Act 11 by the Wisconsin legislature, the ETF Board promptly filed a Petition for Leave to Commence an Original Action challenging the constitutionality of the $200 Million credit imposed by Act 11. The Wisconsin Supreme Court held that the ETF Board lacks standing to challenge the constitutionality of legislation duly enacted by the State of Wisconsin, dismissed the ETF Board's Petition, and later went so far as to deny the ETF Board's motion for leave to file an *amicus curiae* brief. App. 94-95 n. 1. Some "bulwark."

Without a standing army and without access to the courts, the trustee stands as the puppet of a legislature that can think of so many better uses for trust funds than the purpose for which the funds were entrusted. The Court is conspicuously silent as to how the "bulwark" could lawfully protect WRS assets. And what authority to "maintain proper actuarial funding" is preserved for the ETF Board by the *non-statutory* provisions of Act 11? The answer is none. While Petitioners recognize that a "mere" $200 Million have been taken, certainly much more has been put in harm's way with the "principle" that the government can take what does not belong to it as long as it does not take too much (enough to destroy "actuarial soundness").

Employer contribution rates are determined based on the amount which the WRS actuaries determine is needed to fund future benefits after considering all revenue

received from employee contributions and investment earnings. App. 112, ¶ 28. In accordance with this process, the WRS actuaries and the ETF Board determined the appropriate employer contribution rates. While the Respondents assert that this process is protected, even enhanced by Act 11, the fact is that Act 11 supplants those actuarially determined required contributions with existing trust funds. It is worse than nonsense to contend that required contributions to the trust, as determined by the actuaries, can properly be paid with credits that are funded by the trust that is supposed to receive the required payments. The actuaries did not set the required contribution levels at zero at any time. The employer contributions determined to be required by the ETF Board upon the advice of its actuaries will consume the State's $56.3 Million share of the credit in 22.1 months, and School Districts' $84 Million share of the credit in 19.6 months. App. 274. Yet Act 11, implemented by order of the Wisconsin Supreme Court, results in employers not having to pay their required contributions. Act 11 effectively overrides the actuarially set required contribution rates and thereby denies the ETF Board of any meaningful "authority to maintain proper actuarial funding of the Wisconsin retirement system."

2. The Wisconsin Supreme Court's decision herein suggest that the financial success of the WRS justifies the use of the assets of the WRS to pay for non-trust obligations. App. 57, ¶ 121, 75, ¶ 176; WEAC's brief at 3, 13.[2] Respondents urge that so long as a taking from the

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[2] The Brief in Oppostion filed by the Wisconsin Education Assocation Council will be referred to as "WEAC's brief." The Brief in Opposition filed by George Lightbourn, et al. shall be referred to as the "State's brief."

Trust Fund does not, of itself, render the WRS unable to pay benefit commitments, that such taking thereby becomes lawful. State's brief at 23, 25, WEAC's brief at 5, 12. It is undisputed that employer required contributions are the sole obligation of participating employers, and that the sole purpose of the $200 Million credit is to make these required payments on behalf of participating employers. There is also no dispute that participating employers have no property interest in the assets contained in the WRS, and that these assets are held in "trust" *solely* to fund pension benefits for WRS participants. If the money in the WRS does not belong to the participating employers, it can only belong to the beneficiaries of the trust. It certainly cannot be diverted and used for the benefit of participating employers without violating the takings clause of the United States Constitution. The financial capacity of a condemnee has never been a factor in takings cases, and the Wisconsin Supreme Court erred in considering the financial condition of the WRS in determining whether Act 11 unlawfully takes assets belonging to WRS participants.

In any event, the method by which employer contribution rates are determined already considers the financial success of the WRS as the key determining factor in setting contribution rates, and such financial success has already been factored into the employer contribution rates established by the WRS actuaries. The WRS actuaries determined that employer contributions *are needed* and set those amounts in accordance with Chapter 40.

3. Respondents contend that the $200 Million credit account established by Act 11 does not take Petitioners' property because "application of the credit does not negate the employers' obligation to provide sufficient

funding to meet WRS benefit commitments." State's brief at 7, WEAC's brief at 4, App. 74, 75. The Respondents argue that if additional contributions are required in the future, the participating employers will be obliged to pay them. This argument fails for several reasons. First, since 1989, § 40.05(2n), Stats. has provided that when any increase or decrease in contribution rates is necessary to maintain the financial balance of the WRS, any such change is to be apportioned ***equally*** between the employer-required contribution rate and the benefit adjustment contribution rate paid by participating employees. App. 111, ¶ 26. Thus, any subsequent increase(s) in contribution rates will be split evenly between employers and employees, and participants will have to pay 50% of that increase.

Similarly, any decrease in contribution rates that would be attributable to the $200 Million having remained in the Employer Accumulation Reserve (and earnings thereon) instead of being consumed as a credit pursuant to Act 11, would be a savings shared equally with Participating Employees. Thus the cost of the credit is being shifted, in part, to participating employees. App. 111, ¶ 26. Respondents freely admit that the $200 Million will result in a reduction in contribution rates, and Petitioners (and other participants) are being denied their 50% share of these savings in contribution rates. State's brief at 17.

Even to the extent that a shortfall in WRS funding is ultimately required to be "made up" by participating employers, this "make-up" obligation does not justify the employer credit provisions of Act 11. Respondents' contention amounts to a claim that trust funds held for the sole benefit of WRS participants may be borrowed on an

interest free basis and replaced with an IOU from the State of Wisconsin without violating the takings clause of the Federal Constitution. It also amounts to a claim that the WRS may be converted from a funded to an unfunded pension system without depriving WRS participants of their vested property rights. Chapter 40 of the Wisconsin Statutes creates a funded pension system supported by actuarially determined contribution rates. It does not contemplate or permit the conversion of the WRS into an unfunded pension system, and does not permit the assets of the system to be converted or borrowed for purposes of State budgetary relief. Indeed the terms of the trust do not permit any use of the funds other than paying for benefits and the administration costs of the trust at the lowest possible cost.

4. Respondents suggest that the changes imposed by Act 11 are prospective in nature, and are therefore expressly permitted by Section 40.19(1), Wis. Stats. State's brief at 10. This is simply not true. The $200 Million Credit account does not represent a prospective change. The assets being diverted are those already deposited in the WRS as compensation for services rendered *in the past* by WRS participants. Employer contributions are not prospectively eliminated, limited, or modified by Act 11. Rather, Act 11 uses assets belonging to the WRS to pay a continuing obligation of participating employers, and thereby effectively returns some of the assets contained in the WRS to the coffers of participating employers. The assertion that the government helping itself to a credit funded by the property of others is different than taking the property of others is pure nonsense.

5. Respondents and the Wisconsin Supreme Court characterize Petitioners' position as one which argues for

a "right 'to maintain some operating procedure in the WRS that had existed during a period that the participant was rendering service.' " State's brief at 11, App. 53, ¶ 111. Petitioners are not requesting protection for "some operating procedure." The very substantial assets contained in the WRS are property, and that property belongs to WRS participants. Removing the property of WRS participants from the trust – whether directly or by the indirect method of setoff – and using it to pay financial obligations of participating employers constitutes a taking of property in violation of the United States Constitution. It is not merely a matter of protecting a procedure.

6. Under Wisconsin law, the legislature is not free to spend or appropriate the assets or earnings of the WRS except in a manner and for the purposes specifically authorized by the contractual terms reflected in the statutes relating to the WRS. *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 558-59, 544 N.W.2d 888, 892 (1996); *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960). Under the WRS contract, the assets contained in the employer accumulation reserve are to be used solely to purchase annuities for retiring participants. § 40.04(5), Stats., *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 556, 544 N.W.2d 888, 890 (1996).

The Wisconsin Supreme Court, and each of the Respondents, contend that the WRS contract authorizes the use of the assets and earnings contained in the employer accumulation reserve to pay for employer obligations to the trust fund for unfunded liabilities and required employer contributions because the credit account satisfies the general statutory requirement that

benefit commitments to participants be fulfilled "at the lowest possible cost." State's brief at 11, 46, WEAC's brief at 47-48. This reasoning was adopted by the Wisconsin Supreme Court, and is plainly erroneous for several reasons. App. 55, ¶ 115.

Section 40.01, Stats. requires trust funds to be used "**solely** for the purpose of ensuring the fulfillment at the lowest possible cost of the **benefit commitments to participants, *as set forth in this chapter.***" (emphasis added). Clearly, the purpose of this language is to ensure that trust fund assets are expended as efficiently as possible in satisfying benefit commitments to participants. This requirement serves the dual purpose of ensuring the efficient management and use of WRS assets, while at the same time ensuring that WRS assets are not shifted to third parties through the satisfaction of benefit commitments at inflated rates.

The employer credit account uses trust assets in a manner not "set forth in this chapter [(chapter 40)]". The general requirement that benefit commitments be fulfilled "at the lowest possible cost" does not expand the permissible use of trust fund assets beyond those purposes expressly authorized by the WRS Contract. The employer credit account may lower costs for participating employers, but this will always be the case when the obligations of participating employers are shifted to the corpus of the trust fund or to participants. The phrase lowest possible cost is certainly not a license to reduce cost to employers by allowing them to cannibalize the trust fund by raiding the corpus of the trust.

7. The bottom line issue in this case is who is the beneficial owner of the trust funds in the WRS, and the decision of the Wisconsin Supreme Court conspicuously

avoids this issue. A long line of cases makes it clear that the beneficial interest to those funds belong solely to the beneficiaries of the trust. *See* Petition at 19-22. These cases have also made it clear that participating employers have no right to remove funds from the trust. The use of a "credit" funded by the assets of the trust is a ruse that can only be supported with sophistry, and does not constitute a legitimate basis for the disavowal of well established property rights.

8. The Wisconsin Supreme Court suggests that if, in the future, the $200 Million credit causes the contribution rates of participants to increase "they may renew the argument that the balance in the fund would have been greater if there had been no employer credits." App. 77. Notably, the Wisconsin Supreme Court does not retain jurisdiction over this case, and does not suggest that the limitations period for filing an action based on the $200 Million credit provision of Act 11 is extended. The contribution rates for pension systems are based on very extended time lines, and it is not clear when the impact of the $200 Million credit will be felt. However, *any* future increase in contribution rates will be attributable, at least in part, to the fact that $200 Million has been removed from the WRS by Act 11.

9. Respondents contend that there is no conflict among the State court decisions cited by Petitioners. Pension systems are inherently complex, and vary in structure from state to state. This does not change the fact that all funded public pension systems face the common issue of who has beneficial ownership of the system's assets, and whether a state legislature may dip into the those assets as a source of budgetary relief without violating the takings clause of the federal constitution or violating

vested contractual rights of plan participants. The conflicting state court decisions in this regard have been duly noted by legal scholars, and are rooted in the fundamental dispute over participants' property rights in the underlying assets of their pension system. *A Skunk at a Garden Party: Remedies for Participants in State and Local Pension Plans*, 79 Denv. U.L. Rev. 507 (1998), *Public Employee Pensions in Times of Fiscal Distress*, 90 Harv.L.Rev. 992 (1977).

II. CONCLUSION

For all the foregoing reasons, the Petition for Review should be granted.

Respectfully submitted,

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